IN THE

Supreme Court of the United States

October Term, 1963

No. 330

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Appellee,

against

HARRY FRIED,
Defendant-Appellant.

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

HERBERT MONTE LEVY,
Attorney for Appellant.

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Statement of the Case

Though our statement of the Case has already been made in our Jurisdictional Statement, and there is no need to set it forth here again, we do wish, however, to note in the margin two patent errors in the appellee's statement of the facts,[1] and to point out to this Court two new developments demonstrating further the significance of this case:

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[1] (a) Appellee writes (Motion, p. 2) that appellant "is presently at liberty pursuant to a certificate of reasonable doubt"; however such a certificate was denied in the New York Courts, and appellant is presently at liberty pursuant to a stay issued by Mr. Justice Stewart of this Court. (b) Appellee suggests (p. 9) that appellant was dealing in under-the-counter materials, though the record shows that, as the police officer testified, the pictures were in a "drawer full of photographs", and the police officer testified that he could see the photographs (11); the book was on an open rack in the store (12).

1. The very same book ruled obscene beyond a reasonable doubt in the case at bar, "College for Sinners", has just been ruled to be not obscene as a matter of law, and to be constitutionally protected, by the Supreme Court of the State of New York, Queens County, Criminal Term, Part I, per Mr. Justice Shapiro, *People v. Birch et al.*, N. Y. L. J., September 10, 1963, p. 16, cols. 5-8. *Birch* arose out of a raid on the premises of the distributor of "College for Sinners" (All States News Co., Inc.), precipitated by the Appellate Division decision in the very case here at bar.

2. The writer of this brief is informed that, in the flood of cases in the New York City Criminal Court resulting from the affirmance by the Appellate Division of appellant's convictions here, the People of the State of New York are frequently, if not invariably, offering copies of the pictures involved in the case at bar as exhibits.

POINT I

The People's contention that Section 1141 does not punish a bookseller in the absence of actual or constructive knowledge of obscenity is completely incorrect [in reply to appellee's Point I, pp. 7-8].

The People contend that Section 1141 requires proof of actual or constructive knowledge of obscenity, relying entirely upon *People v. Finkelstein*, 9 N. Y. 2d 342, 214 N. Y. S. 2d 363, 174 N. E. 2d 470—the first *Finkelstein* case. But it did not so hold. It was entirely silent (as were the briefs) on the question of constructive knowledge gained via Section 22-a of the Code of Criminal Procedure; all it held was that knowledge of contents (not knowledge of their obscene nature) must be proven. Indeed, the People themselves so argued in the second *Finkelstein* case, writing in their brief:

> "While it is true as both defendants contend that the concurring opinions in *Smith v. Cali-*

Mishkin, equated scienter in obscenity cases to knowledge of obscenity of the books in issue. Mr. Justice Brennan, writing for the majority, defined the term to mean knowledge of the contents of the material . . . Likewise, in this Court's review of the first conviction of these defendants, the term was defined by the majority opinion as knowledge of the contents of the books in issue (*People* v. *Finkelstein*, 9 N. Y. 2d 342, 344 [1961])."

The Court of Appeals obviously agreed with this argument, holding in the second *Finkelstein* case that "In our opinion, however, *scienter*—'knowledge by * * * [defendants] of the contents of the books * * *'—was sufficiently proven beyond a reasonable doubt.'" *People* v. *Finkelstein*, 11 N. Y. 2d 300, 305, 229 N. Y. S. 2d 367, 183 N. E. 2d 661.

In any event, if New York law does require actual or constructive (Section 22-a) knowledge of obscenity, then the conviction here must be overturned—for there was not a scintilla of evidence of such knowledge.

POINT II

The People to the contrary notwithstanding, there simply was no evidence of scienter, of either the contents of the book, or of their obscenity [answering appellee's Point II, pp. 8-10].

There is no point in rehashing our demonstration that there was not a scintilla of evidence of even *scienter* of contents. We pause to note only some observations of Mr. Justice Shapiro in *Bloch*, relevant to the People's purported shock at the blurb on the back of "College for Sinners", quoted at page 10 of their motion. Noted Mr. Justice Shapiro:

> " * * * Sex and sophistication surround [adolescents]. . . . A single page of one of our metropolitan

newspapers contains reviews or advertisements of a number of motion pictures variously described as follows: 'a romp of bawdy tales completely in the Gallic tradition that sex dalliance is the funniest topic on earth'; 'loaded with burlesque seductions, orgies' and a description of the actress 'who plays the mistress'; 'a bold, sexy, disquieting film.'

"Such, whether we approve or disapprove, is the temper of our times . . . ."

rtainly, the blurb on "College for Sinners"—if seen by pellant, seen only at the moment of sale—was no more vocative than those described in *Birch*, or those found the vast majority of fiction paperbacks today.

Two recent developments particularly make crucial consideration by this Court of the question of whether proof actual or constructive knowledge of obscenity is required. footnote 4 of our Jurisdictional Statement (pp. 13-14), noted the great importance of such requirement in the ht of the confused and confusing status of the obscenity in New York. At that writing, we did not suspect that very book found obscene beyond a reasonable doubt in case at bar would only a few weeks later be ruled not scene and constitutionally protected in the Supreme Court New York, Queens County. Similarly, the need for ing the requirement of actual or constructive knowledge a matter of constitutional law is shown by the fact that er the recent grant of review by this Court to a Cali rnia bookseller convicted of selling "Tropic of Cancer", highest Court of California unanimously ruled the book t obscene—while only ten days later the highest Court of w York ruled the very same book obscene by a 4-3 vote.

The significance of these incidents is made manifest on the decision of this Court in *Screws v. United States*, 325 U. S. 91, where this Court construed the Federal Civil ghts statute to require wilfulness, in order to sustain the tute. Said this Court:

scription of the law of obscenity. The need for importing a requirement of wilfulness into the obscenity law is even greater, for anything less impinges upon freedom of the press and speech.

POINT III

The book "College For Sinners" cannot constitutionally be deemed obscene [answering appellee's Point III, pp. 11-12].

We believe that it is apposite to bring to this Court's attention the description by Mr. Justice Shapiro of the book involved here, described by him along with the other seven books involved in the *Birch* case, *supra*:

> "* * * The basic question is whether these books go beyond 'the present critical point in the compromise between candor and shame at which the community (has) arrived'. * * *
>
> "The books contain a great number of descriptions of sexual activity which, in many cases, are only tenuously associated with the plot and story line. They thus, no doubt, provide erotic reading material, but no more so than many works of literature which have received acclaim as classics. * * *
>
> * * *
>
> "* * * The books here offer no such problem [of a search for four letter words] for they contain no 'four letter' words. So far as the purity of the language is concerned the books could well be made required reading for fourth year elementary students. Fully 90 per cent of each book, however, is filled with lurid descriptions of sexual activities, both hetero and homosexual, in sufficient detail to act as an erotic stimulus to those so inclined. However, in all their erotic descriptions they maintain a clever, and apparently deliberate, avoidance of socially un-

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